

FILED
APR 17 PM 1:09
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA



SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF San Francisco

In The Matter of)

NO. CO8-005 SI(Pr)

VEL - NON

on Habeas Corpus,

Petitioner,)

MOTION FOR APPOINTMENT
OF COUNSEL ON HABEAS
CORPUS.

Gov't Code, § 15421

Pen. Code, § 1240(a)

Petitioner, Mark McCain Lowe, hereby moves

this court for an order appointing counsel to represent him in the
above-entitled matter. In support of this motion petitioner submits
as follows:

1. He is a layman unskilled at law, a state prisoner
presently incarcerated at CSP/SAC, Repress, California, proceeding
in pro se as a poor person who cannot afford to hire counsel;

2. Petitioner has stated a prima facie case for
relief as evidenced by the order issued by this court on or about
APRIL 8, 2008, directing the respondent to show cause why relief
should not be granted.

3. Petitioner has a right to representation by counsel
in all criminal matters as a matter of right under state law;

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1 4. It would serve the public interests in the efficient
2 and proper administration of justice by appointing counsel to
3 represent indigent petitioners in criminal matters.

4 Petitioner bases this motion on the pleadings, records
5 and documents on file herein and attached hereto and on the
6 memorandum of points and authorities submitted herewith.

7 WHEREFORE, petitioner prays that this motion be granted
8 and counsel appointed to represent petitioner in this matter.

9 DATED: 4-13-08

10 Respectfully submitted,

11 Mark McCain Lowe

12 (Print name, No., and address below
13 this line; sign above)

14 Mark McCain LOWE
15 CDC-F18836
16 CALIF State Prison - Folsom
17 P.O. Box 290066
18 Represa CA, 95671.
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MEMORANDUM OF POINTS AND AUTHORITIESPRELIMINARY STATEMENT

Petitioner filed the original petition in this matter on or about 12-20-07. On or about, 4-8-08, this court issued an order to show cause to respondent, finding that petitioner had stated a prima facie claim for relief. Exhibit A.

Petitioner is a layman, unskilled at law and possesses only a(n) 6 grade education. Petitioner cannot grasp the fundamental principles of law required to respond to any answer that respondent ~~may~~^{may} make. Further, petitioner cannot, by virtue of his incarceration properly investigate the claims in order to respond and traverse respondent's answer; Nor could any other prisoner assisting in the preparation and filing of these pleadings. Exhibit B. (Petitioner's decl.). For the following reasons, this motion should be granted.

I

PETITIONER IS ENTITLED TO COUNSEL AS A
MATTER OF STATE LAW.

Petitioner argues that, as a matter of statutory law he is entitled to the appointment of counsel in this habeas corpus proceeding. Petitioner alleges that California Gov't Code, Section 15421 and California Penal Code, Section 1240(a) require counsel to be appointed "upon request" of the petitioner, once an order to show cause issues.

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1 show cause issues from the court.

2 However, this appointment is not unconditional or
3 without bounds. Herick v Municipal Court, (1970) 8 Cal App 3d 967,
4 976 (limiting appointments to cases where adequately detailed
5 factual allegations stating a prima facie case are presented and
6 an order to show cause issues); Ligda v Superior Court, (1970) 5
7 Cal App 3d 811, 824 fn 11 (right to counsel attaches under Gov't
8 Code § 15421 and Pen. Code § 1240 only if order to show cause
9 issues).

10 In the instant case the conditions precedent have been
11 met. Petitioner is incarcerated and challenging the care and
12 treatment being imposed, or, the validity of the conviction under
13 which petitioner is incarcerated. Gov't Code, § 15421.

14 Second, petitioner is indigent and unable to employ
15 counsel. Pen. Code, § 1240(a).

16 Third, an order to show cause has issued, stating that
17 petitioner has made a prima facie showing entitling him to relief
18 if the respondent does not show otherwise. Herick, supra; Ligda,
19 supra.

20 Further, the mandatory language of Pen. Code, § 1240(a)
21 leaves no room for interpretation in its purpose: safeguarding
22 the indigent prisoner's right to counsel's representation in all
23 criminal matters. Where mandatory language appears in a statute
24 created to safeguard fundamental rights of prisoners and those
25 charged with criminal offenses, the language is not directory and
26 leaves no room for construction. People v McGee, (1977) 19 Cal 3d
27 948, 962-963 (quoting French v Edwards, (1872) 80 US (13 Wall.) 506,
28 511.

Moreover, Habeas Corpus has been a long-standing remedy to challenge unlawful conditions of confinement as well as the actual validity of the conviction itself. In re Riddle, (1962 57 Cal 2d 848, 851; In re Harrell, (1970) 2 Cal 3d 675, 682; In re Davis, (1979) 25 Cal 3d 384; In re Arias, (1986) 42 Cal 3d 667. Modern practice and views have expanded the scope of the "Great Writ" in California to include within the meaning of an "unlawful" or "unconstitutional" conviction or confinement, the constitutionality and lawfulness of the conditions imposed as a result of that conviction and confinement. In re Riddle, supra, 57 Cal 2d 851; In re Harrell, supra, 2 Cal 3d 682. Accordingly, Cal. Gov't Code, § 15421(b) reflects the extended role of habeas corpus within its language and parameters that comes under the purview of Penal Code, Section 1240(a). Therefore, this motion should be granted.

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II

CAL. CONST., ART 1, § 15 ENTITLES MOVANT
TO THE APPOINTMENT OF COUNSEL IN STATE
CRIMINAL MATTERS, INCLUDING HABEAS
CORPUS PETITIONS AND ACTIONS.

The petitioner argues that as a matter of State and Federal constitutional law, he is entitled to representation by counsel in his habeas corpus proceedings now pending before this court.

It is well settled that a criminal defendant has the unqualified right to the assistance of counsel in all criminal matters. Gideon v Wainwright, 372 US 335,344 (1963); Powell v Alabama, 287 US 45,68-69 (1932). This right has been extended to habeas corpus proceedings and other prerogative writ actions filed in connection with a petitioner's criminal action or punishments suffered as a result. Bravo v Cabell, (1974) 11 Cal 3d 834,838-839 (recognizing prerogative writs in criminal cases as part of a criminal matter requiring counsel, i.e. writs of coram nobis, In re Paiva, (1948) 31 Cal 2d 503,509, and habeas corpus) Id at 839. In re Rose, (1965) 62 Cal 2d 384, Hn 1,2.

Other courts have also agreed unanimously. See e.g. Ligda v Superior Court, supra, 5 Cal App 3d 824; Herick v Muni Court, supra, 8 Cal App 3d 976; In re Tucker, (1971) 5 Cal 3d 171, 204-205 (Due Process right to a hearing triggers the right to appear by counsel) (Parole Revocation proceedings).

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1 California has embraced the guarantees of the Sixth
2 Amendment within the State Constitution, Article 1, Section 15.
3 People v Pope, (1979) 23 Cal 3d 412, 422-424; People v Ledesma,
4 (1986) 43 Cal 3d 171, 215 N. 2. Our courts have expressly reserved
5 their right to afford greater protections of the Sixth Amendment
6 guarantees to our citizenry than the federal courts, ~~based upon~~
7 state law and Article 1, Section 15, holding it to be a "document
8 of independent force, untrammelled by the parallel provisions of
9 the United States Constitution." People v Brisendine, (1976) 13
10 Cal 3d 528, 538-550 (quoting Cal. Const., Art. 1, § 24, which
11 declares that "rights guaranteed by this Constitution are not
12 dependent on those guaranteed by the United States Constitution".
13 See also, Curry v Superior Court, (1970) 2 Cal 3d 707, 716 ("The
14 United States Constitution requires states to provide at least as
15 much protection as it does. It does not forbid a state affording
16 greater protection than that afforded by it as a matter of
17 state law."). See also: Cooper v California, (1967) 386 US 58, 62
18 (The State's highest courts are the final arbiters of state law
19 and federal courts are bound by their decisions.).

20 Further, while the federal courts hold that a state
21 prisoner habeas petitioner has no rights to counsel in a federal
22 habeas proceeding, Coleman v Thompson, 501 US 722, 756 (1991),
23 Bonin v Vasquez, 999 F.2d 425, 429 (9th Cir. 1993), these
24 decisions and holdings cannot and do not negate or limit this
25 state's statutes and courts, nor can they. Cooper, *supra*.

26 More federal habeas petitions are considered "civil"
27 in nature, not criminal. Preiser v Rodriguez, 411 US 475 (1974),
28 and even in California indigent prisoners have no right to

1 appointed counsel to prosecute a civil action. Payne v Superior
 2 Court, (1976) 17 Cal 3d 908. Thus, and although the Coleman
 3 decision makes clear that state prisoners have no right to
 4 counsel on collateral state habeas petitions as a Sixth Amendment
 5 right, Cal. Gov't Code, § 15421(b) and Penal Code, § 1240(a)
 6 make it abundantly clear that habeas corpus petitions and
 7 proceedings are "criminal" actions entitling indigent prisoners
 8 the right to representation and appearance by counsel consistent
 9 with Cal. Const., Art 1, § 15, independent of any federal rights
 10 which may or may not exist.

11 Therefore, the right to counsel in criminal matters
 12 includes collateral habeas corpus proceedings by statutory
 13 definition and law. Accordingly, this motion must be granted.

14 15 CONCLUSIONS

16 For the foregoing reasons this motion must be granted
 17 and counsel appointed the petitioner in this matter.

18 DATED: 4-13-08

19 Respectfully submitted,

20 Mark McCain Lowe
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EXHIBIT

A

ORDER OF COURT DATED 4-8-08,
TO RESPONDENT TO SHOW CAUSE.

EXHIBIT

B

PETITIONER'S DECLARATION IN
SUPPORT OF MOTION TO
APPOINT COUNSEL.

Mark McCain Lowe

Mark McCain Lowe

4-13-08

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF San Francisco

IN THE MATTER OF VEL-NON
On Habeas Corpus

Petitioner,

NO. C08-005 SI (Pr)

DECLARATION OF PETITIONER,
Memorandum, IN
SUPPORT OF MOTION TO APPOINT
COUNSEL ON HABEAS CORPUS.

I, Mark McCain LOWE, declare and state:

I am the petitioner in the above-entitled action, a state prisoner proceeding in pro se and without counsel because I am indigent and unable to afford to hire counsel; I am a layman unskilled at law and have only a grade level 6 education.

All statements contained herein are made upon my own personal knowledge, and if called upon to testify as to these statements, I could do so competently.

I respectfully request that this court appoint counsel to assist or represent me in the above-entitled matter because:

- a. I am indigent and cannot afford to hire counsel;
- b. The legal complexity of the issues at bar are beyond my comprehension and understanding, meaning that I cannot adequately respond to any contentions that the respondent may make of a legal nature;

c. The factual complexity of the issues are such that I will require witnesses, documents and perhaps expert witnesses and statements from any or all of these persons. Because I am incarcerated and indigent, I am unable to do any of these things within the security parameters set by the respondent at CSP/SAC. I am also not sure of what witnesses or records that I will need or which will be relevant for purposes of this action.

d. Even though I had the assistance of another inmate in the preparation of the initial pleadings, the same security concerns and even educational barriers prohibit mutual assistance by other prisoners from being of any use to respond to respondent's contentions. I am thus unable to respond to respondent's contentions or traverse them. I am, in short, deprived of any meaningful access to the courts to prosecute this action without the assistance of trained counsel.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct to my own personal knowledge.

Executed this 13 day of APRIL, 2008, at
California State Prison/Sacramento County, Represa, California.

Mark McCain Lowe

(Sign above; Print Name-Prison # below)

MARK MCCAIN LOWE
CA State Prison-Folsom

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To Clerk of U.S. District Court, For The northern District
of California. I have no knowlidge what so ever in Legal work. I am asking
the court again for a Lawyer with this motion and my petition for Review that
was turned down by the Supreme Court on 11-28-07 in support the court will look
at and please give me a Lawyer, and that on 4-8-08 a show of cause was issue for
Respondant. I had to use a Layman to help me with this and it is not right for some
stranger to be looking through my Legal papers when i need a Lawyer to help me.

mark McCain Lowe

Case NO. C08-005 SI (Pr)